Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

Message Text

SECRET

PAGE 01 LIMA 04425 01 OF 02 262018 Z

62
ACTION SS-25

INFO OCT-01 ADP-00 SSO-00 NSCE-00 /026 W
---------- 056696
O 261925 Z JUN 73
FM AMEMBASSY LIMA
TO SECSTATE WASHDC IMMEDIATE 6048
INFO AMEMBASSY SANTIAGO IMMEDIATE

S E C R E T SECTION 1 OF 2 LIMA 4425

EXDIS

DEPT PASS TREASURY FOR HENNESY AND BRADFIELD

E. O. 11652: GDS
TAGS: OCON, CI
SUBJECT: CHILE COPPER TALKS

REF: LIMA 4406

AFTER INTRODUCTORY REMARKS IN MORNING MEETING JUNE 25, HENNESSY SAID THAT WE THERE TO ANSWER THIRTEEN QUESTIONS THAT HAD BEEN POSED BY CHILEAN DELEGATION.

1. WOULD US PROPOSAL REQUIRE APPROVAL OF CONGRESS AND HOW LONG WOULD THAT TAKE?
HENNESSY SAID OUR PROPOSAL WAS FOR AD HOC ARBITRATION AND WOULD NOT NECESSARILY REQUIRE CONGRESSIONAL APPROVAL. IF THE FRAMEWORK OF 1929 TREATY WERE USED, THIS WOULD REQUIRE APPROVAL OF TWO- THIRDS OF SENATE PRESENT AND VOTING. IF SENATE APPROVAL WERE REQUIRED, THIS COULD BE DONE RAPIDLY, ALTHOUGH WE COULD NOT MAKE ANY COMMITMENTS AS TO TIMING.

2. WHAT WAS US CONCEPT OF ISSUE OF COMPENSATION AND WOULD TRIBUNAL CONSIDER ALL ISSUES?
HENNESSY SAID THAT ARBITRATION WOULD COVER ALL ASPECTS OF COPPER DISPUTE, INCLUDING, FOR EXAMPLE, ASSETS, LIABILITIES AND EARNINGS, AS WELL AS EXCESS PROFITS. IDEA WAS TO ALLOW TRIBUNAL TO DETERMINE ASSURED AMOUNT OF COMPENSATION DUE OR
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PAGE 02 LIMA 04425 01 OF 02 262018 Z

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

DETERMINE THAT COMPENSATION WAS NOT DUE. WE SAW THE ARBITRATION AS ENCOMPASSING WHOLE DISPUTE AND PROVIDING DEFINITIVE SOLUTION.

CHILEANS ALSO ASKED WHETHER WE WISHED HOLD ANYTHING OUT FROM ARBITRATION. HENNESSY ANSWERED THAT WE COULD CONSIDER ISSUE OF DEBT AS OUTSIDE SCOPE OF NEGOTIATIONS BECAUSE OF COMMITMENTS MADE IN PARIS BY CHILEAN GOVERNMENT TO HONOR COPPER DEBT. HOWEVER, ASSUMING A GOOD PACKAGE COULD BE AGREED UPON FOR ARBITRATION OF DISPUTE, WE WOULD NOT RULE OUT INCLUDING DEBT WITHIN SCOPE OF NEGOTIATIONS.

3. HOW MANY MEMBERS WOULD WE WISH TO SEE ON ARBITRATION TRIBUNAL?
HENESSEY SAID HE HAD NO STRONG PREFERENCES. IMPORTANT POINT SHOULD BE THAT TRIBUNAL SHOULD BE NEUTRAL AND NOT BIASED IN FAVOR OF ONE SIDE OR OTHER. WE ANTICIPATED THAT THERE SHOULD BE THREE OR FIVE NEUTRAL MEMBERS ALONG THE LINES OF PANEL FORMULATED IN BEAGLE CHANNEL ARBITRATION. WE REGARDED IT AS SERIOUS MISTAKE TO PUT ENTIRE WEIGHT OF DECISION UPON ONE NEUTRAL PERSON. ESSENTIAL ELEMENTS OF OUR PROPOSAL WERE THAT ARBITRATORS SHOULD BE OF HIGH STANDING SO THAT THEIR DECISION WOULD BE RESPECTED BOTH IN CHILE AND US, THAT THEY BE NEUTRAL IN SENSE OF NOT BEING NATIONALS OF CHILE OR US, THAT PANEL BE FORMULATED BY MUTUAL AGREEMENT, AND THAT NONE OF PANEL MEMBERS WOULD BE CONSIDERED AS AGENTS OF PARTIES.

4. COULD INTERNATIONAL COURT OF JUSTICE SERVE AS ARBITRAL TRIBUNAL?
HENNESSEY SAID CHILE WAS NOT A PARTY TO STATUTE OF INTERNATIONAL COURT OF JUSTICE AND, THEREFORE, WE HAD NOT CONSIDERED QUESTION OF USING ICJ . HOWEVER, AS IN CASE OF BEAGLE CHANNEL ARBITRATION, CONSIDERATION COULD BE GIVEN TO SELECTING MEMBERS OF ICJ TO SERVE ON PANEL.

5. WHAT WAS TO BE THE ROLE AND FUNCTIONING OF WORKING GROUP?
HENNESSY CLARIFIED WHAT WE HAD THOUGHT WAS A POSSIBILITY OF MININTERPRETATION ON CHILEAN SIDE OF SCOPE AND MEANING OF US PROPOSAL. WE HAD USED THE TERM " PANEL" TO INDICATE ARBITRAL TRIBUNAL AND DID NOT INTEND THAT A PANEL WOULD BE ESTABLISHED TO DETERMINE TERMS OF REFERENCE, RULES AND COMPOSITION OF TRIBUNAL . THIS COULD BE DONE BY A WORKING GROUP OF GOVERNMENT
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REPRESENTATIVES WHICH WOULD ELABORATE A DOCUMENT THAT WOULD SET UP TERMS AND CONDITIONS OF ARBITRATION.

HENNESSY SUGGESTED THAT IF OUR PROPOSAL WAS ACCEPTABLE WORKING GROUP COULD GO TO WORK IMMEDITELY AND HE WOULD IMAGINE IT WOULD TAKE AT MOST THREE OR FOUR WEEKS OF INTENSIVE WORK, ASSUMING SPIRIT OF GOOD WILL AND CONFIDENCE, TO REACH AGREEMENT.

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

AT THIS POINT, IT WOULD BE ANNOUNCED THAT CHILE AND US HAD
AGREED TO ARBITRATE COPPER DISPUTES. IN RESPONSE TO FURTHER
QUESTIONING ON CHILEAN SIDE, HENNESSY POINTED OUT THAT WE WOULD
ANTICIPATE THAT ARBITRATION ITSLEF WOULD TAKE SIX TO NINE MONTHS,
ALTHOUGH BEGINNING OF ARBITRATION WOULD DEPEND UPON ARBITRATORS'
SCHEDULES AND BRINGING THEM TOGETHER FOR WORK WHICH HAD TO
BE DONE. IMPORTANT POINT ON US SIDE WAS THAT A TIME LIMIT
BE SET. CHILEAN SIDE ALSO SUGGESTED THAT IT WOULD BE DIFFICULT
TO DRAW UP SPECIFIC PROCEDURAL RULES THAT COULD BIND MEN OF
GREAT IMPORTANCE WHO WE SUGGEST SHOULD BE MEMBERS OF
TRIBUNAL. IT WAS ANSWERED, ON US SIDE, THAT WHAT WE HAD IN
MIND WERE BASIC RULES SETTING UP FRAMEWORK OF ARBITRATION,
INCLUDING ITS BINDING NATURE, ABILITY TO ENFORCE IT,
SEAT OF TRIBUNAL, AND OTHER BASIC PROCEDURAL RULES ALONG LINES

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PAGE 01 LIMA 04425 02 OF 02 262032 Z

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ACTION SS-25

INFO OCT-01 ADP-00 SSO-00 NSCE-00 /026 W
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TO SECSTATE WASHDC IMMEDIATE 6049
INFO AMEMBASSY SANTIAGO IMMEDIATE

S E C R E T SECTION 2 OF 2 LIMA 4425

EXDIS

WORKED OUT IN MODEL ARBITRATION RULES ELABORATED BY INTERNATIONAL
LAW COMMISSION , WORLD BANK' S ARBITRITION ARRANGEMENTS
(ICSID) , AND HAGUE COURT RULES.

6. DOES THE US KNOW THAT ANY AGREEMENT TO BINDING ARBITRATION
AFFECTING THE CHILEAN CONSTITUTION REQUIRES APPROVAL OF THE
CHILEAN CONGRESS?
HENESSY SAID US WAS PROPOSING AD HOC ARBITRATION. ALTHOUGH
WE WERE ALSO AWARE OF POSSIBILITIES OF 1929 ARBITRATION TREATY,
IT WAS NOT LEAR FROM OUR ANALYSIS THAT THIS WOULD REQUIRE
PRIOR CONGRESSIONAL APPROVAL. WE WERE NOT EXPERTS IN CHILEAN
LAW OR POLITICS, THEREFORE IT WAS UP TO THEM TO TAILOR OUR
PROPOSAL TO MEET THIS OBJECTIVE. CHILEANS WOULD BE MUCH MORE

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

EFFECTIVE AT THIS. MEETING POLITICAL AND JURIDICAL PROBLEMS
THAT CHILEANS HAVE POSED WAS BASICALLY A CHILEAN PROBLEM AND
THEY WOULD HAVE TO USE THEIR IMAGINATIONS AND CREATIVITY TO
FIND AN ANSWER.

CHILEANS ARGUED AND MADE IT CLEAR FOR RECORD THAT IT WAS
CHILEAN INTERPRETATION OF 1929 TREATY THAT THEY WERE NOT BOUND
TO A GREATER EXTENT THAN US AND THAT THEREFORE, AS MATTER OF
LAW, CHILE WOULD HAVE TO OBTAIN CONGRESSIONAL APPROVAL FOR
ITS PARTICIPATION IN ARBITRATION UNDER 1929 TREATY. US SIDE
ARGUED THAT CHILEANS HAD OPTION OF PROCEEDING DIRECTLY WITHOUT
CONGRESSIONAL APPROVAL .
ALMEYDA THEN INTERVENED TO SAY THAT THERE WAS A MORE BASIC
PROBLEM FOUNDED ON LEGAL STRUCTURE OF CHILEAN GOVERNMENT.
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PAGE 02 LIMA 04425 02 OF 02 262032 Z

COPPER MATTER WAS A CONSITUTIONAL QUESTION AND THERE WAS
NO AUTHORITY TO DELEGATE TO EXECUTIVE BRANCH OF CHILE MATTERS
PROVIDED FOR IN CONSTITUTION. THIS, HE SEEMED TO BE SAYING
THAT CHILEAN PRESIDENT HAD NO AUTHORITY TO ENTER INTO ARBITRATION
CONCERNING COPPER MATTERS EVEN IF THERE WERE NO REQUIREMENT
IN ADVANCE THAT CONSTITUTION BE CHANGED TO ALLOW IMPLEMENTATION
OF ARBITRAL DECISION UNLESS THEIR CONGRESS HAD GIVEN PRIOR
APPROVAL. HE ASKED WHETHER US EXECUTIVE BRANCH COULD ENTER
INTO ARBITRATION IF RESULT MIGHT INVOLVE AN INTERNATIONAL OBLIGATION
TO AMEND US CONSTITUTION.

US SIDE RESPONDED BY STATING THAT EXECUTIVE BRANCH, WITHIN
SCOPE OF ITS CONSITUTIONAL AUTHORITY, COULD ENTER INTO AGREEMENTS
THAT WOULD CREATE INTERNATIONAL OBLIGATIONS EVEN THOUGH FULFILLMENT
OF THOS OBLIGATIONS WOULD DEPEND UPON CONGRESSIONAL APPROVAL.
IT WAS OUR UNDERSTANDING AND OUR PROPOSAL THAT CHILEAN PRESIDENT
COULD ENTER INTO AN AGREEMENT TO ARBITRATE THAT WOULD INVOLVE
AN INTERNATIONAL OBLIGATION TO CARRY OUT ITS FINDINGS EVEN THOUGH
IT COULD NOT BE IMPLEMENTED WITHOUT FURTHER ACTION BY
CHILEAN CONGRESS.

ALMEYDA SAID THAT EVEN IF CHILEANS ACCEPTED OUR LEGAL
INTERPRETATION, POLITICALLY IT WAS IMPOSSIBLE TO IMPLEMENT IT
IN CHILE. HE BELIEVED THAT BEST ANSWER WAS IN 1914 TREATY.
THIS WOULD CONSITUTE A POLITICAL EVENT THAT COULD LEAD TO FULFILLMENT
OF THIRD US POINT-- A DEFINITIVE SOLUTION. HE SAID THIS WAS BEST
APPROACH AS OTHER TWISTED OR FORCED PROCEDURES COULD NOT BE
CARRIED OUT AND MIGHT EVEN LEAD TO NEGATIVE REACTION AND
WORSENING OF ALREADY EXISTING PROBLEMS. HE SAID THAT OBJECTIVE
SHOULD BE TO MAKE MODIFICATIONS ON BOTH SIDES AND HE THOUGHT
THAT TO ACHIEVE US DESIRES ON OH THREE POINTS, HE COULD PROPOSE:
A) THAT 1914 PROCEDURES WOULD CONSITUTE AN ADVERSARY LITIGATION
AND B) THAT AS RESULT OF THIS LITIGATION, COMMISSION WOULD BE
REQUIRED TO MAKE RECOMMENDATIONS FOR SETTLEMENT. ALTHOUGH
THESE WERE NOT LEGALLY BINDUYG , THEY WOULD BE CARRIED OUT

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

SIMILAR TO CONCILIATORY COMMISSIONS THAT WERE REGULARLY USED
IN CHILE' S DOMESTIC PROCEDURES.

HENNESSY SAID HE HAD HEARD WITH GREAT INTEREST THE POSSIBILITY
OF MODIFICATION OF BOTH PROPOSALS WHICH CHILEANS HAD SAID THEY
WOULD TAKE UNDER CONSIDERATION. HOWEVER, HE HAD MADE FORMAL
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PAGE 03 LIMA 04425 02 OF 02 262032 Z

PROPOSAL AND HE URGED ALMEYDA TO TAKE BACK OUR FORMAL PROPOSAL
AND MAKE FORMAL RESPONSE, ALTHOUGH WE WOULD KEEP IN MIND
SUGGESTIONS THAT CHILEANS HAD MADE ABOUT THEIR OWN PROPOSAL.

IT WAS AT THIS POINT THAT KUBISCH JOINED MEETING AND
HENNESSY SUMMARIZED COURSE OF DISCUSSIONS.

KUBISCH THEN RESTATED OUR UNDERSTANDING OF WHERE THINGS NOW
STOOD. HE UNDERSTOOD THAT CHILEAN SIDE WAS NOT REJECTING
US PROPOSAL AND WAS TAKING OPPORTUNITY TO POSE NUMBER OF QUESTIONS
TO CLARIFY ITS SCOPE AND MEANING. HE SAID THAT, FRANKLY, HE
STRONGLY URGED AND HOPED THAT CHILEANS WOULD ACCEPT OUR
PROPOSAL WHICH HAD BEEN MADE ONLY AFTER MOST CAREFUL CONSIDERATION
AND HAD HIGHEDG LEVEL SUPPORT. WE HAD MADE CONSIDERABLE
CONCESSION IN PUTTING IT FORWARD AND WE WOULD AWAIT THEIR REPLY
WITH HOPE THAT IT WOULD BE ACCEPTED BY CHILEAN GOVERNMENT.

HOWEVER, IN RESPONSE TO CHILEAN REQUEST ON AN INFORMAL
BASIS TO GIVE CONSIDERATION TO TWO ADDITIONAL POINTS ON 1914
TREATY, KUBISCH WANTED TO STATE THAT HE HAD NO AUTHORITY TO DO
ANYTHING BUT MAKE PROPOSAL THAT WE HAD PUT FORWARD. HE DID,
HOWEVER, HAVE INSTRUCTIONS TO NEGOTIATE POSITIVELY AND IN
CONSTRUCTIVE FRAME OF MIND. ON THIS BASIS, WE WOULD CONSIDER
CHILEAN POINTS AMONG OURSELVES AND WITH OTHERS IN WASHINGTON WHO
HAVE GIVEN SUCH CAREFUL CONSIDERATION TO OUR OWN PROPOSAL.

ALMEYDA SAID HE UNDERSTOOD US REQUIRED FORMAL REPLY
OF CHILEAN GOVERNMENT AND THAT THEY WOULD DO SO WITH COMMENTS
AND PROPOSED MODIFICATIONS THAT THEY BELIEVED TO BE CONSTRUCTIVE.
HHE SAID WE WERE REACHING OBJECTIVE OF BRINGING TOGETHER VARIOUS
POINTS OF VIEW, ESPECIALLY AS RESULT OF DISCUSSION THIS MORNING.
HE HOPED THAT WE COULD BRING OUR PROPOSAL CLOSER TO VIABILITY
SINCE IT NOW HAD DIFFICULTIES FOR CHILEAN SIDE.

IT WAS THEN AGREED TO BREAK FOR LUNCH AND TO RESUME AT 6 P. M.
TO DISCUSS THREE REMAINING CHILEAN QUESTIONS ABOUT COPPER
COMPANY LITIGATION AND UNBLOCKING OF MULTILATERAL INSTITUTION
LENDING, AS WELL AS POSSIBILITY OF PRESS COMMUNIQUE.
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Declassified/Released US Department of State EO Systematic Review 30 JUN 2005

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US Department of State
EO Systematic Review
30 JUN 2005

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